THE YEAR 2008 IN REVIEW: DEVELOPMENTS IN CALIFORNIA DESIGN AND CONSTRUCTION LAW

Written and Presented by:

Harold E. Hamersmith, Helen J. Lauderdale and Candace L. Matson[1]

Los Angeles County Bar Association
Construction Law Subsection
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[1] Hal Hamersmith and Candace Matson are partners in the Construction Practice Group of the Los Angeles office of **Sheppard, Mullin, Richter & Hampton, LLP**. Helen Lauderdale is special counsel in the same practice group.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

I. CONSTRUCTION CONTRACT CLAIMS

1. Crawford v. Weather Shield Mfg. Inc., 44 Cal. 4th 541, 79 Cal. Rptr. 3d 721 (2008)

Residential construction contracts entered into after January 1, 2006 cannot contain terms that would require a subcontractor to defend and indemnify other participants on the project for claims arising out of those other participants' negligence. In Crawford v. Weather Shield, the California Supreme Court addressed whether a subcontractor could be forced to pay a developer's defense costs based on a pre-2006 contract clause requiring the subcontractor to defend lawsuits "founded upon claims growing out of" the subcontractor's work, even though the subcontractor was cleared of any negligence. For residential construction contracts prior to January 2006, the Supreme Court recognized that the parties were free to define their defense and indemnity duties to one another. Both the general statutory provisions regarding indemnity found in Civil Code Section 2778 and the specific language of the indemnity clause at issue required the subcontractor-indemnitor to accept and assume the defense of the developer-indemnitee against the claims immediately, without regard to whether the subcontractor ever is proved to be negligent. The Supreme Court disapproved Regan Roofing Co. v. Superior Court, 24 Cal. App. 4th 425 (1994) to the extent that decision held that a contractual duty to defend against claims depends on the promisor's ultimate liability for indemnity on those claims.

The Crawford decision may have limited application in the residential construction field, given the restrictions on indemnity clauses in residential construction contracts enacted in 2006 and 2008 (see Civil Code Section 2782). But its holding that an indemnity clause stating an indemnitor will defend the indemnitee in connection with lawsuits "founded upon claims alleging loss" caused by the indemnitor's negligent role on a project creates an immediate duty on the part of the indemnitor to undertake and pay for the defense of the indemnitee without regard to any determination of negligence has broad application outside of the residential construction context. The Supreme Court interpreted such an indemnity clause to require the insurance approach to defense and indemnity obligations: (a) the duty to defend is broader than the duty to indemnify; (b) the duty to defend depends on the allegations of the complaint, not on the court's ultimate determination that the indemnitor was negligent; and (c) the indemnitor must pay the indemnitee's defense costs even if the court eventually determines that the indemnitor was not negligent.

2. Great Western Drywall, Inc. v. Roel Construction Co., Inc., 166 Cal. App. 4th 761, 83 Cal. Rptr. 3d 235 (4th Dist., Aug. 2008)

A subcontractor on a condominium project filed suit against the general contractor for unpaid change orders, and the general contractor cross-complained under both tort and breach of contract theories to recover the cost of repairing work the subcontractor had damaged. At the end of trial, the judge awarded the subcontractor $250,000 for undisputed, unpaid change orders, plus pre-judgment interest on that amount. The judge awarded the general contractor $320,000 for the cost of repairing property damaged by the subcontractor, but did not specify whether the award was based on a tort or breach of contract theory. The general contractor appealed the award of prejudgment interest, contending that its recovery against the

subcontractor was an offset that exceeded the unpaid change order amount and, therefore, there was no amount owed the subcontractor on which prejudgment interest could be earned. The subcontractor appealed, contending that it was entitled to 2% per month penalty interest on the unpaid, undisputed change orders under the prompt payment provisions contained in Business and Professions Code Section 7108.5. The court of appeal concluded that the general contractor's recovery of damages against the subcontractor was an offset against undisputed amounts it owed the subcontractor, regardless of whether the recovery was under a tort or contract theory. Because the contractor's recovery exceeded the undisputed amount owed the subcontractor, the subcontractor was not entitled to any prejudgment interest. For the same reason, the court of appeal concluded that the subcontractor was not entitled to any penalty interest on the unpaid change orders under the prompt payment laws.

3. Civil Code Section 2782(c) - (h)

The Legislature clarified the statute restricting the extent to which a subcontractor on a residential construction project can be required to indemnify the builder or other contractors on the project and established a series of steps for subcontractors to follow when a builder or general contractor tenders the defense to the subcontractor.

4. Civil Code Section 2782.9

Subcontractors on residential construction projects for which there are wrap-up insurance programs cannot be required to defend and indemnify other project participants for claims that are covered by the wrap-up insurance program.

II. ALTERNATIVE DISPUTE RESOLUTION: ARBITRATION

1. Adajar v. RWR Homes, Inc., 160 Cal. App. 4th 565, 73 Cal. Rptr. 3d 17 (4th Dist., Apr. 2008)

Single-family homeowners brought a construction defect lawsuit against the developer. Developer sought to compel arbitration on grounds that warranty booklets issued to homeowners at close of escrow contained arbitration clauses. The trial court denied the motion on the grounds that developer failed to meet its burden of proving the existence of a valid arbitration agreement that was incorporated into the sale documents, the homeowners were not seeking relief under the warranties, and the arbitration agreement in the warranty booklets was both procedurally and substantively unconscionable. The appellate court affirmed. As a threshold matter, the existence of an arbitration agreement is to be determined by the court, not by the arbitrator. Here, developer failed to submit proof as to any arbitration clause incorporated into the sale documents.

2. Agri-Systems, Inc. v. Foster Poultry Farms,
168 Cal. App. 4th 1128, 85 Cal. Rptr. 3d 917 (5th Dist., Dec. 2008)

General contractor sought to correct or vacate an arbitration award in favor of owner, contending the arbitrator improperly failed to disclose that his law firm had previously

represented a third party that was adverse to the general. The appellate court affirmed the trial court's ruling that disclosure was not required. The award was ultimately confirmed. The appellate court applied Code of Civil Procedure section 1281.9(a), which "sets forth the general requirement that a proposed neutral arbitrator 'shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.'" The facts were that the representation was of a debtor in a bankruptcy proceeding; that the firm had withdrawn from the representation before the litigation between the debtor and the general contractor began, and that the arbitrator was not appointed until a year and a half after the representation had concluded. The appellate court held that substantial evidence supported the trial court's ruling that, under these facts, disclosure was not required.

3. Baker v. Osborne Development Corp., 159 Cal. App. 4th 884, 71 Cal. Rptr. 3d 854 (4th Dist., Jan. 2008)

A "new home warranty" booklet was referenced in the warranty application form, but was provided only after homeowners purchased their homes. The booklet contained an arbitration requirement running solely in favor of the developer. The court held that the arbitration provision was unconscionable.

4. Best Interiors, Inc. v. Millie and Severson, Inc., 161 Cal. App. 4th 1320, 75 Cal. Rptr. 3d 1 (2d Dist., Mar. 2008)

Subcontractor sued owner, general contractor and building inspectors, alleging that it had not been paid and that the inspectors had hindered subcontractor in its work. The prime contract and subcontract both contained arbitration clauses, but the building inspectors were not subject to arbitration. The trial court denied a petition to compel arbitration pursuant to Civil Code of Procedure section 1281.2 on the ground that the inspectors were not subject to arbitration and that if the claims were to be separated between a litigation and an arbitration proceeding, judicial economy would not be served and there would be a danger of inconsistent rulings. The appellate court affirmed, and also held that because the contractual arbitration provisions were to be governed by California law, the Federal Arbitration Act did not preempt section 1281.2, citing Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989).

5. Bruni v. Didion, 160 Cal. App. 4th 1272, 73 Cal. Rptr. 3d 395 (4th Dist., Mar. 2008)

In a construction defect lawsuit brought by single-family homeowners, the builders moved to compel arbitration based on a warranty booklet which contained arbitration provisions. The warranty booklet was preprinted, voluminous, did not distinguish the arbitration provisions, was buried in a numerous other purchase and sale documents, and was offered on a "take it or leave it" basis. Homeowners were told not to read the booklet before signing the application, and actually received it only after signing or even later. The trial court refused to order arbitration on the grounds that the arbitration provisions were unconscionable, and the appellate court affirmed. First, it was the purview of the trial court, and not the arbitrator, to resolve the unconscionability claim. Second, the arbitration provisions were unconscionable because they were contained in a contract of adhesion and they violated the homeowners' reasonable expectations as their scope was "unforeseeably broad."

6. Otay River Constructors v. San Diego Expressway, 158 Cal. App. 4th 796, 70 Cal. Rptr. 3d 434 (4th Dist., Mar. 2008)

Contractor entered into two design-build contracts with the public entity owner for construction of a highway project, the "Gap/Connector Contract" and the "Toll Road Contract." It then entered into a third contract with the owner called the "Coordination Agreement," the purpose of which was to ensure the two prior contracts were coordinated. The Toll Road Contract provided that disputes would be resolved by arbitration. However, the Gap/Connector Contract provided for the litigation of disputes. The Coordination Agreement provided that disputes under *that* agreement would be arbitrated. The contractor initiated arbitration, nominally under the Coordination Agreement, but admitted that the claims arose under the Gap/Connector Contract. Contractor's petition to compel arbitration was denied on the ground that the Gap/Connector Contract provided for the litigation of disputes. Thereafter, owner sought to recover its attorneys' fees under the Coordination Agreement. The trial court denied the motion on the ground that owner could not be a prevailing party since further litigation was contemplated. However, the appellate court reversed. The trial court's decision on the petition to compel arbitration was final as to the only contractual issue before the court. Because owner recovered the greater relief on the contract issue, under Civil Code section 1717, it was the prevailing party and entitled to recover its attorneys' fees.

7. Thompson v. Toll Dublin, LLC, 165 Cal. App. 4th 1360, 81 Cal. Rptr. 3d 736 (1st Dist., Sept. 2008)

Condo owners sued a developer for fraud based on alleged concealment of mold. Defendants sought to compel arbitration based on Title 7, part of the statutory scheme contained in Civil Code §§ 895 et seq. which is concerned with construction defect claims. The court held that the dispute provisions of this scheme only apply to Title 7 claims and not to non-Title 7 claims such as fraud. The court also held that the arbitration provisions of Title 7 were unconscionable as to plaintiffs because latter had no meaningful opportunity to negotiate the provisions and they were presented in 800 pages of documents given to plaintiffs.

III. DESIGN AND CONSTRUCTION DEFECTS LITIGATION

1. Greystone Homes, Inc. v. Midtec, Inc.,
168 Cal. App. 4th 1194, 86 Cal. Rptr. 3d 196 (4th Dist., Dec. 2008)

In an action brought by plaintiff-home builder against defendant-manufacturer for damage caused by plumbing fittings manufactured by defendant, summary judgment for defendant is reversed and remanded where: 1) a builder may recover from a product manufacturer for economic losses caused by the manufacturer's violation of the standards set forth in the Right to Repair Act through an equitable indemnity action; but 2) a builder may not recover for these losses through a direct negligence claim against the manufacturer.

The court summarized the basis of its ruling as follows:

> "In response to the holding in Aas, the Legislature enacted Civil Code section 895, et. seq. (the Right to Repair Act or the Act). The Act establishes a set of building standards pertaining to new residential construction, and provides homeowners with a cause of action against, among others, buildings and individual product manufacturers for violation of the standards (§§ 896, 936). The Act makes clear that upon a showing of violation of an applicable standard, a homeowner may recover economic losses from a builder without having to show that the violation caused property damage or personal injury (§§ 896, 942). In such an instance, the Act abrogates the economic loss rule, thus legislatively superseding Aas."

With respect to the builder's equitable indemnification cause of action against the product manufacturer, the court observed that "[t]here is nothing in the Act that suggests that the Legislature intended to preclude indemnity claims under the Act." Though the builder was neither a homeowner or homeowners association entitled to bring a *direct* action on its own behalf under the Act, it was entitled to bring a *derivative* equitable indemnity action. The latter is based on an indemnitee's joint legal obligation with an indemnitor, not the indemnitor's direct liability to the indemnitee.

2. Sienna Court Homeowners Ass'n v. Green Valley Corp.,
164 Cal. App. 4th 1416, 79 Cal. Rptr. 3d 915 (6th Dist., July 2008)

In a suit by a homeowner's association against a developer arising from construction defects at a residential complex, denial of a condominium owners association's motion to intervene in the action is affirmed where: 1) the court properly denied mandatory intervention since appellant did not need to intervene in order to protect its interests; 2) appellant had no right to joinder as an indispensable party; and 3) appellant did not meet the requirements for a discretionary intervention.

The motion was based on a joint use and maintenance agreement between the condominium owner's association and the homeowner's association, under which they shared the use of certain common facilities and had joint responsibility for their maintenance. The condominium owner's association argued that it was entitled to intervene in order to ensure that any recovery on the construction defect action would be allocated properly between the parties with duties to maintain and repair. But the court held that a judgment in the defect action would have no effect on the association's ability to protect its interest in the repair of the joint common facilities under the joint use and maintenance agreement, and therefore intervention was not necessary.

3. Ritter & Ritter, Inc. v. Churchill Condominium Ass'n, 166 Cal. App. 4th 103, 82 Cal. Rptr. 3d 389 (2d Dist., July 2008)

In an action against defendant condominium association for breach of fiduciary duty and negligence, judgment in favor of plaintiff-homeowners is affirmed over claims of error that: 1) the general verdict and special findings were inconsistent and irreconcilable and the special findings controlled; 2) the CC&R's alone determine the rights and obligations between the parties; 3) the trial court erred in applying the "rule of judicial deference" set forth in Lamden v. La Jolla Shores Condominium Homeowners Assn., 21 Cal. 4th 249 (1999), with respect to the personal liability of individual members of a nonprofit homeowners association; 4) the trial court erred in instructions submitted to jury; 5) it erred in ordering the injunction; and 6) it erred in determining the plaintiffs were the prevailing parties. The action arose out of complaints by the purchasers of two units that cigarette smoke odors had wafted up to their units from the floor below.

4. Treo @ Kettner Homeowners Assoc. v. Superior Court (Intergulf Construction Corp.), 166 Cal. App. 4th 1055, 83 Cal. Rptr. 3d 318 (4th Dist., Sept. 2008), review denied, 2008 Cal. LEXIS 14082 (Cal., Dec. 10, 2008).

In a suit by petitioner homeowners association against developer and others for alleged construction defects, trial court order making general judicial reference is vacated where: 1) legislature did not intend that CC&R's be sufficient to effectively and permanently waive the constitutional right to trial by jury; and 2) a developer-written requirement in the association's CC&Rs that all disputes between owners and developer and disputes between the association and developer be decided by a general judicial reference is not a "written contract" as the legislature contemplated the term in the context of Code of Civil Procedure section 638. When the legislature stated in section 638 that the right to jury trial could be waived by written contract, it did not mean to include equitable servitudes created by the CC&Rs of common interest communities.

IV. ARCHITECTS-ENGINEERS LICENSING

1. Senate Bill 1608 (Enacted September 28, 2008)

This bill requires an attorney to provide a specified written advisory to a building owner or tenant with each demand for money or complaint for any "construction-related accessibility claim," as defined, in a form to be developed by the Judicial Council, and on a separate page clearly distinguishable from the demand for money, as specified. Among other things, the bill requires architects to receive training in disabled access, codified in Business & Professions Code section 5600(d)(3):

> "Coursework regarding disability access requirements shall include information and practical guidance concerning requirements imposed by the Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. Sec. 12101 et. seq.), state laws that govern access to public facilities, and federal and state regulations adopted pursuant to those laws. Coursework provided pursuant to this paragraph shall be presented by trainers or educators with knowledge and expertise in these requirements. The board shall require that a licensee certify that he or she has satisfied the requirements of this subdivision as a condition of license renewal."

The bill sponsors' letter to the Senate and Assembly Journals stated that "SB 1608 is a bipartisan comprehensive reform measure intended to promote compliance with disability access laws with the complementary goal of reducing unnecessary litigation. A key feature of the bill is the early evaluation conference held by the court for certain cases involving construction-related accessibility claims. Where a business has obtained a Certified Access Specialist (CASp) inspection and report to determine whether construction-related accessibility standards are met in a place of public accommodation, the CASp inspection report entitles the business to request a limited stay and an early evaluation conference on the construction-related accessibility claim."

V. CONTRACTOR'S LICENSING

1. Great West Contractors, Inc., et al. v. WSS Industrial Construction, Inc., 162 Cal. App. 4th 581, 76 Cal. Rptr. 3d 8 (2d Dist., Apr. 2008)

A structural steel subcontractor sued the general contractor on a school construction project for amounts owed under a subcontract. The subcontractor submitted a bid for the work in August 2001, prepared shop drawings and ordered anchor bolts for the project in October 2001, and executed the subcontract on December 1, 2001. The subcontractor was a corporation, but did not obtain a contractor's license in the corporation's name until December 21, 2001. At the time it submitted its bid, however, the subcontractor's president held a valid individual license and had done so for several years. The general contractor executed the subcontract in January 2002. At trial, the general contractor and its surety brought a motion for nonsuit on the ground the subcontractor was not properly licensed at all times during the performance of the subcontract and was, therefore, barred by Business and Professions Code Section 7031(a) from maintaining the lawsuit. The trial court denied the motion and awarded the subcontractor more than $220,000 in damages, statutory penalties, and interest.

The court of appeal reversed. It rejected the subcontractor's argument that preparing shop drawings and ordering bolts was "prefatory" work for which no license was required and could be segregated from the work under the subcontract that required a license. Preparing structural steel shop drawings and ordering anchor bolts were tasks integral to the structural steel scope of work. It also rejected the argument that work performed prior to the full execution of the subcontract by both parties was exempt from licensing requirements. The court noted that the Contractors Licensing Law applies to *any acts* for which a license is required, regardless of whether the acts were performed pursuant to a formal contract. And it concluded that the subcontractor could not rely on its president's individual licenses to qualify for the substantial compliance exception to the licensing requirements of Business and Professions Code Section 7031. The corporate subcontractor that executed the subcontract and filed the lawsuit had never held a license prior to December 21, 2001. It could not establish all three elements of the substantial compliance doctrine: (1) a prior valid license; (2) a reasonable and good faith attempt to maintain the license in good standing; and (3) a reasonable lack of knowledge that the license had lapsed.

2. Goldstein et al. v. Barak Construction, 164 Cal. App. 4th 845, 79 Cal. Rptr. 3d 603 (2d Dist., July 2008)

Plaintiff homeowners entered into a contract with Barak Construction to remodel their home in mid-June 2004. Barak began work on the project right away, but did not obtain a contractor's license for the first time until mid-September 2004. The plaintiffs paid Barak $362,629.50 for its work before Barak allegedly abandoned the incomplete project. The plaintiffs then filed suit under Business and Professions Code Section 7031(b), which allows a person who uses the services of an unlicensed contractor to bring an action to recover all

compensation paid to the unlicensed contractor. The plaintiffs sought a writ of attachment against Barak for the full amount paid, plus an amount for attorneys fees and costs. The superior court granted the writ of attachment.

Barak appealed the order granting the attachment and the court of appeal affirmed. It concluded that the homeowners' recoupment action satisfied all of the requirements for a prejudgment attachment set forth in Code of Civil Procedure Section 483.010. It rejected Barak's contention that the recoupment action was punitive in nature rather than a claim for money based upon a contract that will support a writ of attachment. Because a contract for services lies at the heart of the claim against the unlicensed contractor, such a claim is fundamentally contractual in nature and can be the basis for obtaining an attachment order. It also rejected Barak's contention that the amount of the attachment was improper and excessive because Barak had passed along most of the money it received to laborers or material suppliers for the project. Though the court recognized the draconian nature of the recoupment action, the Contractors License Law allows recovery of *all* compensation paid to the unlicensed contractor regardless of whether the amounts paid are ultimately retained by it. And the court of appeal rejected the contention that the amount of the attachment should be reduced by the amount earned by Barak after it became a licensed contractor. The court reiterated that to recover for work performed on a project, a contractor must be licensed *at all times* during which it performs the contractual work.

VI. MECHANIC'S LIENS, LIS PENDENS AND BONDS

1. T.O. IX v. Superior Court (Asphalt Professionals, Inc.), 165 Cal. App. 4th 140, 80 Cal. Rptr. 3d 602 (2d Dist., July 2008)

Where a contractor who built one street benefiting nine subdivision lots filed an identical lien on each of the lots, each for the full amount of the debt, owner could post a single surety bond for the amount of the debt and obtain release of all nine liens.

2. Formula Inc. v. Superior Court (iStar Financial, Inc.), 168 Cal. App. 4th 1455, 86 Cal. Rptr. 3d 341 (3d Dist., Dec. 2008)

Plaintiff brought action in Florida seeking to compel construction and sale condominium units located in California, and recorded a lis pendens giving notice of the Florida action against the California property. Defendants succeeded in getting the lis pendens expunged by a California superior court. The California appellate court denied a petition for writ of mandate, holding that the California lis pendens statutes, Code of Civil Procedure sections 405–405.61, do not apply to a notice of litigation that is pending in the courts of another state; and therefore the notice of Florida action should not have been recorded and is subject to expungement.

3. S.B. 1432 – Claim Against Contractor's Bond by Homeowner Contracting for Home Improvement

S.B. 1432 added a new sub-section to Business and Professions Code section 7071.5, providing that a contractor's bond shall be for the benefit of the following:

> "(b) A property owner contracting for the construction of a single-family dwelling who is damaged as a result of a violation of this chapter by the licensee. That property owner shall only recover under this subdivision if the single-family dwelling is not intended for sale or offered for sale at the time the damages were incurred."

VII. PROMPT PAYMENT

1. S&S Cummins Corporation v. West Bay Builders, Inc., 159 Cal. App. 4th 765, 71 Cal. Rptr. 3d 828 (1st Dist., Jan. 2008)

A subcontractor sued a prime contractor for refusing to release retention following a public entity's release of retention to the prime. The prime claimed that the subcontractor was liable for project delay. The trial court found that there was no *bona fide* dispute pursuant to which the prime was entitled to withhold the retention, and ordered the prime to pay, among other amounts, $114,139 in statutory prompt payment charges. In a cross-appeal, the subcontractor made two contentions regarding the application of Public Contract Code section 7107. First, it contended that the trial court erred by concluding the 2 percent per month charge is not applied on a compounded basis. Second, it contended that the trial court erred in concluding the penalty ceases to be assessed upon judgment. The appellate court affirmed the trial court, noting these are issues of first impression. The Court held that the penalty does not compound because the plain language of the statute states it is to be charged only against the "improperly withheld amount." It further held that the penalty "ceases to accrue upon entry of judgment."

2. Brawley v. J.C. Interiors, Inc., 161 Cal. App. 4th 1126, 74 Cal. Rptr. 3d 832 (5th Dist., Apr. 2008)

When the owners of an office building under construction failed to make a progress payment when the builder claimed it was due, the builder walked off the project. Another contractor completed the project. The owners sued the builder for lost rents, and the builder cross-claimed against the owners and the owners association for non-payment. Three of the four owners and the association settled with the builder. After trial, both the fourth owner and the builder were awarded damages by the jury. However, after offsetting the builder's damages with what it received in settlement, the builder's net award was zero. The trial court denied the builder's request for attorneys' fees under Civil Code section 3260 and 3260.1 which require the prompt making of retention and progress payments. Although the statutes state that "the prevailing party shall be entitled to his or her attorney's fees and costs," they do not define who is a prevailing party. Hence, the trial court has discretion to determine whether a party has

prevailed. The appellate court cited the California Supreme Court's holding in Hsu v. Abbara, that where a court has such discretion, it "is to compare the relief rewarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives . . ." *Id.*, 9 Cal. 4th 863, 876 (1995) (discussing Civ. Code § 1717.) Here, the trial court acted well with in its discretion to refuse to find the builder was the prevailing party.

VIII. PUBLIC WORKS OF IMPROVEMENT

A. Design-Build

1. Consulting Engineers and Land Surveyors of California, et al. v. Department of Transportation, et al., 167 Cal. App. 4th 1457, 84 Cal. Rptr. 3d 900 (3d Dist., Oct. 2008)

In 2000, California voters passed Proposition 35, which added an article to California's Constitution stating that governmental entities "shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement." Article XXII, Section 1. Six years later, the California Legislature enacted a series of statutes granting the Los Angeles Metropolitan Transportation Authority the authority to construct a particular high occupancy vehicle lane using the design-build procurement method, but mandating that certain parts of the preliminary engineering, environmental, and construction inspection work for the project be performed by Caltrans employees. Public Contract Code Sections 20209.26, 20209.32, and 20209.34.

The Consulting Engineers and Land Surveyors of California ("CELSOC"), which represents the interests of private engineering firms in California, challenged those aspects of Sections 20209.26, et seq. that reserved portions of the work on the HOV lane project exclusively for Caltrans employees. CELSOC contended the requirement that certain work be performed by Caltrans violated Article XXII of the California Constitution. The trial court and court of appeal agreed. The court of appeal noted that the purpose of Proposition 35 was to give government agencies unfettered discretion to engage private architects and engineers for any and all phases of public works projects. The Public Contract Code's mandate that certain pieces of a design-build project be performed by Caltrans employees directly conflicted with Article XXII. Generally speaking, while Caltrans can choose to have its own employees perform engineering work on road projects, the California Legislature cannot *mandate* that Caltrans employees perform the work.

2. Public Contract Code Section 20193 – 20195 (A.B. 642)

The Legislature authorized cities, counties and special districts to use the design-build contracting method for a total of 20 wastewater treatment facility, solid waste facility, and water recycling facility projects exceeding $2.5 million over the next ten years and established detailed bidding procedures to be followed in the event the design-build method is used. This

authorization is independent of any other statutory authorizations for design-build for any such entities.

B. Competitive Bidding

1. Titan Electric Corporation v. Los Angeles Unified School District, 160 Cal. App. 4th 188, 72 Cal. Rptr. 3d 570 (2d Dist., Mar. 2008)

California's Subletting and Subcontracting Fair Practices Act (Public Contract Code Section 4100, et seq.) prohibits a prime contractor on a public works project from replacing a subcontractor that was listed at the time of the bid except when one of the nine circumstances listed in the Act at Section 4107 exists. It also requires the prime contractor to obtain the public agency's approval for the substitution before the originally listed subcontractor is replaced. The goal of the Act is to prevent a prime contractor from bid shopping and bid peddling after the contract is awarded.

In Titan Electric, an electrical subcontractor on two LAUSD projects encountered financial difficulties and eventually instructed its workers not to return to the jobsites, notified the prime contractor it would be winding down its operations, and allowed the prime contractor to retrieve from a warehouse lighting equipment that the subcontractor had purchased for the projects. The prime contractor, in turn, notified LAUSD of the subcontractor's abandonment of the projects and requested authority to hire a replacement subcontractor. The electrical subcontractor, however, requested an administrative hearing regarding the proposed substitution. The hearing date was set, but then postponed for three months to allow the prime contractor and subcontractor to pursue settlement discussions. In the meantime, the prime contractor made arrangements with a replacement subcontractor to complete the electrical work. By the time the administrative hearing took place and the LAUSD issued its decision approving the requested substitution, all of the electrical work had been completed by the replacement subcontractor.

The originally listed subcontractor argued unsuccessfully at trial and again on appeal that the substitution was invalid because the LAUSD did not authorize it until after the replacement subcontractor had completed all of the electrical work. The court of appeal conceded that on its face the statute contemplates the public agency will authorize a proposed substitution before it actually takes place. But the court of appeal held that an after-the-fact approval of a substitution is permissible provided the substitution procedure reasonably complies with the objectives of the statute to prevent bid peddling and bid shopping following contract award. In Titan, the court concluded the substitution complied with the purposes of the statute because the LAUSD gave prompt notice to the original subcontractor of the requested substitution, there was no evidence of any bid peddling or bid shopping, and there was substantial evidence of the electrical subcontractor's inability to perform the subcontracts. Thus, although the LAUSD's authorization of the replacement subcontractor did not literally comply with the requirements of Section 4107, under the substantial compliance doctrine, the after-the-fact approval was sufficient validation of the substitution.

2. Los Angeles Unified School District v. Great American Insurance Company, 163 Cal. App. 4th 944, 78 Cal. Rptr. 3d 99 (2d Dist., June 2008), depublished and review granted, 84 Cal. Rptr. 3d 35, 193 P.3d 280 (Cal. 2008).

Where the record did not indicate whether trial court considered defendant's extrinsic evidence regarding the interpretation of a construction contract, and the contract language was not so clear and explicit as to be unambiguous on its face, trial court erred by dismissing the evidence under the parole evidence rule and granting summary judgment in plaintiff's favor. Rescission claims may be asserted against a public entity, and a contractor may recover for extra work caused by a breach of contract. Contractor may maintain a cross-action for breach of contract by a public agency based on nondisclosure of material information if contractor can establish that agency knew material facts concerning the project that would affect contract's bid or performance, and failed to disclose those facts. Where contractor suddenly and unexpectedly walked off the job, requiring public agency to take immediate action to prevent damage or deterioration of the facility, these facts met the statutory definition of "emergency" pursuant to Public Contract Code Sec. 20113.

C. Claims Presentation Requirements

1. Arntz Builders v. City of Berkeley, 166 Cal. App. 4th 276, 82 Cal. Rptr. 3d 605 (1st Dist., Aug. 2008)

The contract between Arntz Builders and the City of Berkeley for the construction of a library required any claims for additional compensation to be submitted in a specific format and within specific time periods. The contract also required unresolved claims totaling more than $375,000 to be mediated. Compliance with all of the contractual claims procedures, including mediation, was a condition precedent to any litigation involving the claims. At the conclusion of the project, Arntz submitted claims for millions of dollars of additional compensation and the City waived the requirement for a pre-litigation mediation. Arntz then sued the City, which eventually moved for summary adjudication of Arntz's breach of contract claims for failure to submit a timely claim under Government Code Sections 905 and 910. The trial court granted the City's motion and the court of appeal reversed. The court of appeal noted that contractual claim procedures and the Government Code claim procedures of Section 905 and 910 serve the same purpose – allowing the government to investigate claims promptly and resolve them without litigation if appropriate -- and are intended to be alternatives. Unless a public agency drafts a contractual claim procedure that requires the submission of a Government Code claim, a contractor need not submit a Government Code claim in addition to a contractual claim before filing suit.

D. Progress Payments on Department of Transportation Projects

Public Contract Code Section 7202 (S.B. 593) was enacted to provide:

"(a) The Department of Transportation is prohibited from withholding retention proceeds when making progress payments to a contractor for work performed on a transportation project.

…

(c) The department shall promptly notify the appropriate policy committees of the Legislature if the state's best interests are compromised because retention was not withheld on a transportation project."

E. False Claims Act

1. United States v. Eghbal, 2007 WL 581463 (9th Cir., December 5, 2009)

False Claims Act contemplates liability not only for fraudulently causing government to pay a claim but also for causing government to approve a claim. Where defendants sold foreclosed homes to buyers with mortgage-secured government-issued loans who lacked sufficient assets for a down payment and provided such buyers with funds for a down payment but defendants then submitted statements to government denying they had provided any of buyers' down payments, defendants' false statements bore directly upon likelihood that buyers would be unable to make mortgage payments, and thus had a causal connection to buyers' subsequent defaults sufficient to support FCA liability. The Court also held that a correctly calculated award of treble damages did not violate Eighth Amendment's prohibition on excessive fines.

The Court stated that "[t]he plain language of the FCA contemplates liability not only for fraudulently causing the Government to pay a claim, but also for causing the Government to *approve* a claim."

2. Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (U.S. 2008)

In a qui tam action by respondent former employees, respondents had introduced evidence that petitioners subcontractors issued certificates of conformance falsely stating that their work complied with U.S. Navy specifications for certain generator sets needed in the construction of Navy destroyers, and that petitioners presented invoices for payment to the prime contractor shipyards. However, respondents did not introduce the invoices that the shipyards submitted to the Navy. The Supreme Court held that to show a violation of the False Claims Act, plaintiff must show that defendant intended that the government itself pay the claim, or establish that conspirators agreed that a false record would have "a material effect" on the Government's decision to pay the false claim.

The Court noted that in the view of the Court of Appeals, it is sufficient for a plaintiff under 31 U.S.C.S. § 3729(a)(2) to show that a false statement resulted in the use of Government funds to pay a false or fraudulent claim. Under that statute, however, the defendant must make the false record or statement "to get" a false or fraudulent claim "paid or approved by the Government." The Court ruled: "'To get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be

liable under § 3729(a)(2). Additionally, getting a false or fraudulent claim 'paid … by the Government' is not the same as getting a false or fraudulent claim paid using 'government funds.' … Under § 3729(a)(2), a defendant must intend that the Government itself pay the claim. Eliminating this element of intent, as the Court of Appeals did, would expand the False Claims Act well beyond its intended role of combating 'fraud against the *Government*.'"

The Court went on to state that while § 3729(a)(2) does not demand proof that the defendant caused a false record or statement to be presented or submitted to the Government, it does require that the defendant made a false record or statement for the purpose of getting "a false or fraudulent claim paid or approved by the Government. "Therefore, a subcontractor violates § 3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim."

IX. PREVAILING WAGE/EMPLOYMENT LAW

A. Prevailing Wage and Project Stabilization Agreement Issues

1. State Building and Construction Trades Council of California v. Duncan, 162 Cal. App. 4th 289, 76 Cal. Rptr. 3d 507 (1st Dist. Apr. 2008)

California Labor Code Section 1720 requires employers on public works projects to pay the prevailing wage to workers if the projects are "paid for in whole or in part out of public funds." The owners and renovators of a low income apartment complex in Rancho Cucamonga were to receive an allocation of $600,000 in low income housing tax credits and sought a determination from the Director of the Department of Industrial Relations that the tax credits did not amount to a payment of public funds and would not subject the renovation work to any prevailing wage requirements. Although the Department of Industrial Relations had taken the position in 2003 that low income housing tax credits qualified as a form of payment of public funds thereby subjecting the developer to the requirement of paying prevailing wages, the Director issued a contrary determination in connection with the Rancho Cucamonga project.

Representatives of the building trades challenged the Director's determination that such tax credits do not amount to the payment of public funds. The trial court agreed with the building trades that such tax credits play an important role in financing low income housing projects and, as such, amount to a public subsidy or payment toward the project. The trial court overturned the Director's determination that prevailing wages need not be paid on the Rancho Cucamonga project.

The court of appeal reversed. The court of appeal analyzed at length the legislative history surrounding proposed amendments to Section 1720, examined closely the attributes of low income housing tax credits, and concluded the tax credits were neither a payment of money from the state nor the transfer of an asset of value for less than fair market consideration. Nor did the court see any basis for concluding the Legislature intended to use the tax credits to further the policies supporting the prevailing wage law. Thus the court of appeal concluded that the renovation project did not qualify as a project paid for in whole or in part from public funds and was not subject to prevailing wage requirements.

2. Trustees of the Southern California IBEW-NECA Pension Trust Fund v. Flores, 519 F.3d 1045 (9th Cir. 2008)

Herman Flores was an electrical subcontractor on two elementary school safety and technology upgrade projects for the Los Angeles Unified School District. Flores' work was governed by a Subscription Agreement with the IBEW local, which obligated Flores to make pension trust fund contributions on behalf of his employees, and by a Project Stabilization Agreement ("PSA"), which obligated Flores to hire all his workers through the union referral system, provided that the referral system was able to meet his needs for workers. For the first two months of the project, the union was unable to supply workers. For those two months,

Flores used his own workforce of nonunion employees and did not make contributions for them to the pension trust fund. Thereafter, the union referred workers to Flores and Flores began making pension fund contributions.

Trustees of the pension trust fund conducted an audit, determined that Flores had not made contributions for the work performed by non-union employees, and sued to collect the delinquent trust fund contributions. The district court entered judgment in favor of Flores, holding that the PSA was ambiguous as to who were "covered workers" and never expressly required contributions for non-union employees.

The Ninth Circuit reversed. The recognition clauses in both the Subscription Agreement and the PSA reflect that the agreements covered all electrical workers on the projects regardless of their union status. Flores' obligation to make pension contributions to the trust fund was not conditioned on the union's referral of employees to the project but, instead, was an independent obligation that existed with respect to every electrical worker on the project.

B. Employment Discrimination

1. Davis v. Team Electric Co., 520 F.3d 1080 (9th Cir. 2008)

Plaintiff, Christie Davis, was the only female electrician working on a project to construct a high school. Plaintiff complained to her supervisor about circumstances involving her work, including lack of variety in her work assignments, disproportionate assignment to dangerous or strenuous work, including work involving exposure to Monokote, exclusion from the construction trailer, and a series of remarks by colleagues that were hostile to women and that made her feel uncomfortable. The employer assigned additional female electricians to the school project and assigned plaintiff to a different supervisor. Plaintiff nevertheless submitted a complaint alleging unlawful employment discrimination to the Oregon Bureau of Labor and Industries. Shortly after her complaint was dismissed, plaintiff's employer experienced a downturn in business and conducted a series of layoffs. Plaintiff was in the second group of electricians to be laid off.

Following the layoff, plaintiff filed a complaint for disparate treatment, retaliation, and hostile work environment under Title VII of the Civil Rights Act. The district court granted summary judgment to the employer. The Ninth Circuit reversed, finding that with respect to each of the three claims, plaintiff had offered sufficient evidence to raise genuine issues of material fact. The Ninth Circuit noted that the plaintiff's hostile work environment claim was a particularly close case, in which the severity of frequent abuse was questionable, but opted to leave the decision to the fact-finder. In addition, the employer could be held liable for a hostile environment created by its employees because it offered no evidence it took steps to prevent sexual harassment, no evidence that any supervisors were disciplined for mistreating plaintiff, and no evidence that the plaintiff failed to take advantage of preventive or corrective opportunities the employer offered.

X. INSURANCE

1. Great Western Drywall, Inc. v. Interstate Fire & Casualty Company, 161 Cal. App. 4th 1033, 79 Cal. Rptr. 3d 657 (4th Dist., Mar. 2008)

A drywall subcontractor sued the general contractor for nonpayment. The general cross-claimed for, among other things, breach of contract and negligently causing property damage to other work on the project. The subcontractor was a named insured on the general's commercial general liability policy, and it tendered the defense of the cross-claim to the insurer. The insurer denied tender, in part based on a cross-suits exclusion that provided "this policy does not apply to any claim or suit for injury or damage by one Insured against another Insured.." The subcontractor contended that an exception to the exclusion applied which provided that "This exclusion does not apply to . . . actions to apportion liability between Insured's *[sic]* where any Insured has been sued for a covered loss." After the underlying litigation concluded, the subcontractor sued the insurer for breach of contract and breach of the implied covenant of good faith and fair dealing. The trial court granted summary judgment to the insurer, holding that there was no duty to defend because of the cross-suits exclusion, as to which it found the exception did not apply. The appellate court affirmed. Because the general's cross-claim could not be characterized as an action for indemnity or apportionment (as there was no third party claim), the exception was inapplicable.

2. Monticello Ins. Co. v. Essex Ins. Co., 162 Cal. App. 4th 1376, 76 Cal. Rptr. 3d 848 (2d Dist., Apr. 2008)

Homeowners filed a construction defect lawsuit against the general contractor and various subcontractors, but not against the drywall subcontractor. The general's insurer, Monticello, provided a defense. The general cross-claimed against the drywall sub and demanded defense by the sub's insurer, Essex. Essex defended the drywall sub, but not the general contractor. After settlement, Monticello sued Essex for equitable contribution. The trial court denied Monticello's summary judgment motion which sought a ruling that Essex had a duty to defend the general and to contribute towards the general's defense. Affirmed: neither the pleadings nor extrinsic evidence revealed a possibility that the defect claims against the general contractor might be covered by the drywall sub's policy. Therefore, Essex had neither a duty to defend the general or to contribute to its defense.

3. Roberts v. Assurance Co. of America, 163 Cal. App. 4th 1398, 78 Cal. Rptr. 3d 361 (2008)

The "efficient proximate cause" is the predominating or most important cause of two or more causes underlying a loss. Here, earth movement, an excluded peril, was the proximate cause of a house being destroyed by earth movement, and not concealment of an ancient landslide. Hence, there was no coverage.

XI. SAFETY/PERSONAL INJURY

1. Jones v. P.S. Development Co., 166 Cal. App. 4th 707, 82 Cal. Rptr. 3d 882 (2d Dist., Sept. 2008), review denied, 2008 Cal. LEXIS 14247 (Cal., Dec. 10, 2008)

In an action for negligence and product liability for injuries sustained during employment at LAX airport, grant of summary judgment in favor of defendant company is affirmed over claims of error that: i) Sanchez v. Swinerton & Walberg Co., 47 Cal. App. 4th 1461 (1996), misstated the governing legal principles; and ii) there were triable issues regarding the completion and acceptance of respondents' work on the pertinent machine. Under "completed and accepted" doctrine, when a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. Undisputed evidence that machine whose alleged defect caused plaintiff's injuries had been fully installed prior to the accident, and that defendant electrical contractor did no work on the machine thereafter, was sufficient to show that work had been "completed," even though defendant maintained workers in other parts of the project area pursuant to the contract and building inspectors had not yet signed off on the work on the machines.

2. Padilla v. Pomona College,
166 Cal. App. 4th 661, 82 Cal. Rptr. 3d 869 (2d Dist., Sept. 2008), review denied, 2008 Cal. LEXIS 14308 (Cal. Dec. 10, 2008)

Property owner and its general contractor were not liable for injuries suffered by demolition subcontractor's employee struck by gushing water from broken pipe, where defendants--although they had the ability to shut off the pipe after the accident occurred--delegated safety measures to plaintiff's employer, which made no request to shut off the water and could have set up an emergency valve on the pipe. State regulation requiring that "[u]tility companies shall be notified and all utility service shut off, capped, or otherwise controlled, at the building or curb line before starting demolition, unless it is necessary to use electricity or water lines during demolition," but not specifying who is to carry out those acts, does not impose non-delegable duties on property owners or general contractors, and a cause of action for negligence per se cannot be maintained against such parties based on the regulation. Liability for failure to disclose hazardous condition could not be imposed where the allegedly hazardous condition was pressurized PVC pipe and the pressurization in the pipe was fully disclosed to plaintiff's employer, which knew of the pipe and failed to take necessary precautions to protect it from harm during demolition process.

3. Chin v. Namvar,
166 Cal. App. 4th 994, 83 Cal. Rptr. 3d 294, (2d Dist., Sept. 2008)

In a personal injury claim for an injury sustained while performing painting services at shopping center owned by defendants, grant of summary judgment in favor of defendants is affirmed over claims that the court erred by: 1) ignoring Labor Code section 2750.5 (section 2750.5) which creates a rebuttable presumption that an unlicensed person who performs work requiring a license is an employee, not an independent contractor; 2) imposing on plaintiff

the burden of proving that he was an employee; and 3) concluding that plaintiff was estopped to assert he was an employee.

4. Ramirez v. Nelson,
44 Cal. 4th 908, 80 Cal. Rptr. 3d 728 (Aug. 2008)

In a wrongful death suit arising after an unlicensed contractor hired by defendants-homeowners to trim trees at their residence was electrocuted via a tool's contact with an overhead high voltage line, the Supreme Court reversed the Second District Court of Appeal's decision which had reversed a jury verdict for defendants. The Court held that the court of appeal erred in finding that Penal Code section 385(b), which makes it a misdemeanor for any person, either personally "or through an employee", to move any tool or equipment within six feet of a high voltage overhead line, set forth a statutory duty of care owed by defendants-homeowners to the decedent.

5. Tverberg v. Fillner Construction, Inc.,
168 Cal. App. 4th 1278, 86 Cal. Rptr. 3d 265 (1st Dist., Dec. 2008)

In a personal injury action against general contractor for negligence, premises liability, and loss of consortium, summary judgment for defendant is reversed and remanded where: 1) as plaintiff was an independent contractor and not an employee of the construction company, Privette v. Superior Court and its progeny did not apply to bar plaintiff from being able to seek recovery from defendant; 2) for the same reasons, plaintiff's wife was not barred from seeking recovery for her loss of consortium claim; and 3) defendant did not establish its right to summary judgment as a matter of law.

6. Madden v. Summit View, Inc.,
165 Cal. App. 4th 1267, 81 Cal. Rptr. 3d 601 (1st Dist, Aug. 2008)

In a negligence case brought by an individual injured while working for a subcontractor at a home construction site, summary judgment for defendant-general contractor under the Privette-Toland doctrine is affirmed. Even if decisions in certain cases were rejected and the approach in Evard v. Southern California Edison, 153 Cal. App. 4th 137 (2007), was followed, the Cal-OSHA regulation that plaintiff relied on (requiring railings to be placed on elevated platforms) was insufficient to create a triable issue of material fact as to whether the general contractor affirmatively contributed to the employee's injury or otherwise had a duty.